UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

ENERGY AUTOMATION SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	Case No. 3:06-1079
	)	
v.	)	Judge Trauger
	)	
XCENTRIC VENTURES, LLC, *ET AL*.,	)	Magistrate Judge Griffin
	)	
Defendants.	)	

MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Pursuant to Fed. R. Civ. P. 12(b)(2), Defendants XCENTRIC VENTURES, L.L.C. ("Xcentric")(hereinafter "Defendant") hereby moves this Honorable Court for an order dismissing the Amended Complaint of Plaintiff ENERGY AUTOMATION SYSTEMS, INC. ("EASI"). As explained below, Defendant has no minimum contacts with the State of Tennessee and is not subject to jurisdiction in this Court.

In conjunction with this issue, pursuant to Fed. R. Civ. P. 11 Defendant will seek, at the appropriate time via separately-filed pleadings, sanctions against EASI and Plaintiff's counsel, jointly and severally, including an award of all their attorney's fees incurred on the basis that this action was frivolous at the time it was filed and the pleadings submitted herein contain statements/allegations of fact which were known by Plaintiff and its counsel to be patently false.

10297-1/DSG/DSG/576946_v1

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I. BACKGROUND

a. Parties

As alleged in ¶ 2 of Plaintiff's Amended Complaint ("Compl."), Defendant Xcentric is an Arizona-based LLC which operates a website located at **www.RipoffReport.com** and **www.BadBusinessBureau.com** (the "ROR Site" or "Rip-Off Report"). Xcentric does not own any assets in Tennessee, does not have any offices in Tennessee, does not have any agents in Tennessee and does not conduct any business in Tennessee. Xcentric does business in Phoenix, Arizona, and its agents, and assets are all located in Phoenix, Arizona. (Declaration of Ed Magedson, attached as Exhibit "1")

The ROR Site is akin to a free public message board, allowing users to post and view comments about businesses who they feel have wronged them.

As alleged in ¶ 3 of the Complaint, Defendant ED MAGEDSON (who has not yet been served) is a resident of the State of Arizona. Mr. Magedson is the founder of Rip-Off Report and is the "Editor-in Chief" of the ROR Site. EASI is a Tennessee-based business engaged in the distribution of equipment which reduces electricity consumption. *See* Compl. ¶ 6.

b. Summary of Claims

The Complaint originally filed in this matter contained the following claims:

Initial Complaint Doc. #1; November 6, 2006	
#	**Claim**
1	Defamation
2	TN Consumer Protection Act
3	Tortious Interference w/ Business Relations
4	Civil Conspiracy
5	RICO; 18 U.S.C. § 1962(c)

6	RICO; 18 U.S.C. § 1962(d)

After the initial Complaint was filed, on February 26, 2007, this Court issued a *sua sponte* order (Doc. # 14) requiring EASI to file a RICO case statement, including a detailed statement of facts in light of the "reasonable inquiry" standards of Rule 11.

Rather than filing a RICO case statement as ordered, on March 5, 2007, EASI filed an Amended Complaint (Doc. # 15) which dropped the two RICO claims against Xcentric, leaving only state-law claims including common law defamation:

Amended Complaint Doc. #15; March 5, 2007	
#	**Claim**
1	Defamation
2	TN Consumer Protection Act
3	Tortious Interference w/ Business Relations
4	Civil Conspiracy
~~5~~	~~RICO; 18 U.S.C. § 1962(c)~~ **(Claim removed)**
~~6~~	~~RICO; 18 U.S.C. § 1962(d)~~ **(Claim removed)**

In terms of operative facts, EASI's Amended Complaint states:

> ¶ 12. Defendants have solicited and published on the [ROR] Website complaints containing numerous false and deceptively misleading statements of fact concerning EASI, its dealerships and its employees made at least in part by a few disgruntled former EASI dealers using different pseudonyms to disparage EASI and to create the appearance that numerous dealers are unhappy with EASI.

Notably, ¶ 12 contains only general allegations that *something* defamatory has been published; the actual statements about EASI are not quoted.

Later, ¶ 17 of the Amended Complaint discusses two separate but related allegations, each of which are important to this motion. The first part of ¶ 17 states:

¶ 12. Upon information and belief, Defendants have developed and/or created on the Website titles, various headings and editorial messages concerning individuals and/or companies targeted by the reports. These report titles, headings and editorial messages have been published on the website and constitute original content.

Again, Plaintiff generally alleges that Defendants have created *some* content on the ROR Site, but no specific statements are quoted, and Plaintiff does not allege that any of the content mentioned in Paragraph 12 of its Amended Complaint is about Plaintiff.

In the second part of ¶ 17, Plaintiff finally quotes some of the allegedly false statements about it which have been posted on the Rip-Off Report site such as:

- That EASI's dealership are a "complete" and "long running" "scam";
- That EASI is a "damn scam ripoff business from hell";
- That EASI's Chief Executive Officer is a "consumer fraud ripoff artist con man";
- That EASI's Chief Executive Officer and other employees are "crooked" and "crooks";
- That "EASI like to threaten anyone that complains whether dealer or ex-employee," and
- That EASI has engaged in "fraud".

Although these quotations are "lumped in" to ¶ 17 immediately following the general claim that Defendants have created *some* content on Rip-Off Report, Plaintiff *never claims* (in ¶ 17 or elsewhere) that Defendants actually *created* any of the statements quoted above.

This position is, in fact, confirmed in ¶ 21 of the Amended Complaint wherein Plaintiff explains that the CEO of EASI, Mr. Jospeh Merlo, contacted Ed Magedson to inform him of the allegedly false statements about EASI on Rip-Off Report and to request that they be removed. In this paragraph, EASI also admits that Mr. Merlo told Mr. Magedson that EASI had determined the true identity of the author of these messages as a result of prior litigation between EASI and the author; "Mr. Merlo offered to prove the falsity of many of the statements with sworn testimony of the person who admitted to submitting the messages to Defendants." ¶ 21 (emphasis added).

In fact, in his email to Mr. Magedson, Mr. Merlo was exceptionally clear regarding the identity of the person who created the defamatory statements about EASI. Mr. Merlo even referenced sworn deposition testimony from the author:

From: EASIJoe@aol.com [mailto:EASIJoe@aol.com]
Sent: Monday, May 22, 2006 10:48 AM
To: EDitor@ripoffreport.com
Subject: Attn: ED Magedson

> Ed:
>
> . . .
>
> During pre-trial discovery we learned that virtually all the negative postings on Ripoffreport were made by ONE man. . . . He has admitted to this in a sworn, videotaped, deposition.
>
> . . .
>
> However, considering that we have this man's sworn testimony, ON VIDEOTAPE, . . . I will be pleased to have our lawyers provide you with a copy of the transcript of that portion of his testimony, or even a copy of the video.
>
> Best regards,
> **Joseph C. Merlo**
> Chief Executive Officer

See Exhibit 2 (entire email) (emphasis added)

As explained below, because EASI's Amended Complaint never alleges that Defendants actually created/wrote any of the allegedly defamatory statements at issue in this case, Defendants are entitled to absolute immunity pursuant to the Communications Decency Act, 47 U.S.C. § 230(c)(1). For that reason, because Plaintiff cannot show that Defendants have "directly targeted tortious activity" at a resident of Tennessee (Plaintiff), there is no basis for this Court to exercise personal jurisdiction over Defendants in this forum. As such, Plaintiff's Amended Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2).

II. COMMUNICATIONS DECENCY ACT—SHORT HISTORY

It is well-established law that under certain circumstances, those who "publish" or "distribute" defamatory statements via traditional methods (i.e., a newspaper or magazine) can be liable for false statements authored by a third party:

> At common law, "primary publishers," such as book, newspaper, or magazine publishers, are liable for defamation on the same basis as authors. Book sellers, news vendors, or other "distributors," however, may only be held liable if they knew or had reason to know of a publication's defamatory content.

Barrett v. Rosenthal, --- Cal.Rptr.3d ----, 2006 WL 3346218, *4 (Cal. Nov. 20, 2006) (citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); Prosser & Keeton, The Law of Torts (5th ed.1984) § 113, pp. 810-811; Rest.2d Torts, § 581, subd. (1), & coms. c, d, & e, pp. 232-234; *Osmond v. EWAP, Inc.* 153 Cal.App.3d 842, 852-854 (1984)).

For many years, this rule made sense because the publisher of traditional media sources can always review content before publication—in other words, virtually every word in a newspaper has been or could be reviewed by the publisher before printing. For that reason, courts have allowed defamation plaintiffs to sue a publisher even if the content at issue was written by a third party.

In recent years, the Internet has presented a new paradigm wherein people can publish statements by the millions on public message boards virtually instantly, at any time of the day or night, without any opportunity for pre-publication review by the site operator. Allowing traditional publisher or distributor based liability against website operators in this context would thus provide an immense incentive for such websites to prohibit any publication of messages by third parties, thereby reducing the amount of free speech available online.

For that reason, in 1996 Congress enacted the Communications Decency Act, 47 U.S.C. § 230, which prohibits all civil actions that treat an interactive computer service as the "publisher or speaker" of messages transmitted over its service by third parties. This federal statute, which was passed by Congress with the intent to "promote unfettered speech," provides in relevant part that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1) (emphasis added). Section 230 further provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Green v. America Online*, 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone, or alter content.'").

An outstanding explanation of this law and its history is set forth in the California Supreme Court's recent opinion in *Barrett v. Rosenthal*, --- Cal.Rptr.3d ----, 2006 WL 3346218 (Cal. Nov. 20, 2006), cited above. In fact, as the *Barrett* Court recognized, the CDA has been universally interpreted as providing immunity to interactive websites for content created by a third party. *See Barrett*, 2006 WL 3346218, *18 note 18; (citing *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933–934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko's, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004

(Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J. Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

Secondary authority has also explained that:

> [The CDA's] provisions set up a complete shield from a defamation suit for an online service provider, absent an affirmative showing that the service was the actual author of the defamatory content. Accordingly, a number of courts have ruled that the ISP was immune from liability for defamation where allegedly libelous statements were made available by third parties through an ISP or were posted by third parties on the server's billboards, as the ISP fell within the scope of 47 U.S.C.A. § 230.

Jay M. Zitter, J.D., Annotation—*Liability of Internet Service Provider for Internet or E–mail Defamation* § 2, 84 A.L.R.5th 169 (2000) (emphasis added) (citing Pantazis, Note, *Zeran v America Online, Inc.: Insulating Internet Service Providers From Defamation Liability*, 34 Wake Forest L. Rev. 531 (1999)); *see also Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003) (recognizing, "Making interactive computer services and their users liable for the speech of third parties would severely restrict the information available on the Internet. Section 230 therefore sought to prevent lawsuits from shutting down websites and other services on the Internet.") (quoting *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 983–84 (10th Cir. 2000).

This significant body of authority unanimously confirms that the CDA provides complete immunity to interactive websites absent an affirmative showing that the service was the actual author of the defamatory content.[1] Because the Amended Complaint fails to allege that Defendants have actually authored any of the specific defamatory speech at

[1] It is clear that EASI was well-aware of this rule when it drafted its original and First Amended Complaints. In addition, undersigned counsel Speth specifically advised Plaintiff's counsel of this rule in correspondence sent pursuant to Rule 11.

issue, and because the declarations submitted herewith establish that Defendants have not authored any of the allegedly defamatory material on Rip-Off Report concerning EASI, Plaintiff cannot establish the primary basis for personal jurisdiction—that Defendants "direct tortious conduct at EASI, which maintains its principal place of business in this judicial district … ." Compl. ¶ 5.

As for the secondary basis for jurisdiction—that Defendants "operate a commercial, interactive website in this judicial district[]"—the declarations submitted herewith demonstrate this allegation is entirely false and insufficient to create personal jurisdiction. Since there are no proper bases for personal jurisdiction, this Court must dismiss the action.

III. ARGUMENT

The plaintiff bears the burden of making a *prima facie* showing of the court's personal jurisdiction over a defendant. *See generally Sommer v. Davis*, 317 F.3d 686, 691 (6th Cir. 2003). "Additionally, in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991) (emphasis added).

Here, the argument is simple—pursuant to the Communications Decency Act, Defendants are immune from liability absent affirmative proof they authored the content. Here, EASI fails to allege that Defendants created any of the statements alleged in ¶ 17 of the Amended Complaint, and Defendants' declarations deny creating such content (See Exhibit 1, Exhibit 3).

For that reason, Defendants are protected from liability under the CDA and thus cannot be shown to have "intentionally directed tortious conduct" at EASI in Tennessee.

a. Defendant Is Not Subject to General Jurisdiction In Tennessee

Personal jurisdiction may be either "general" or "specific." *Bird v. Parsons*, 289 F.3d 865, 873 (6th Cir. 2002). General jurisdiction exists when a defendant's "contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *Id.* (citing *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989)).

There is no basis for general jurisdiction here. Xcentric is an Arizona-based LLC. Other than merely operating the Rip-Off Report website (free of charge to users) which can be viewed in Tennessee, Defendant has no contacts with this forum. This is insufficient to establish personal jurisdiction because United States courts are virtually unanimous in holding that the mere operation of a website in location "A" which is viewable in location "B" does not confer jurisdiction in location "B". *See, e.g., Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997) (noting, "as far as we are aware, no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state.") (emphasis added) (citing *Smith v. Hobby Lobby Stores*, 968 F.Supp. 1356 (W.D.Ark. 1997)).

The only effort to allege general jurisdiction appears to be found in ¶ 11 of the Amended Complaint where Plaintiff claims that "Defendants have edited and published over two thousand reports directed at Tennessee companies … ." (emphasis added) Of course, as explained above, this allegation is immaterial since Defendants cannot be treated as the "publisher" of statements which they did not create. *See Green v. America Online*, 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the CDA, "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.'").

In addition, as explained in the declaration of Ed Magedson submitted as Exhibit 1 herewith, every time a user submits a report to Rip-Off Report for publication, the user is required to agree that the State of Arizona shall have exclusive jurisdiction over any dispute arising from the report. "Forum-selection 'clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Security Watch, Inc. v. Sentinel Systems, Inc.*, 176 F.3d 369, 375 (6th Cir. 1999).

Finally, in ¶ 22 of the Amended Complaint, Plaintiff claims that the Rip-Off Report site is "commercial in nature in that it, among other things, advertises, promotes and offers to sell to Tennessee residents and others Defendants' purported consumer advocacy publication the 'Rip-Off Revenge Guide' for $21.95." As explained in Mr. Magedson's declaration, this claim is false; the "Rip-Off Revenge" publication is sold by a different entity, not by Defendants.

b. Defendant Is Not Subject to Specific Jurisdiction In Tennessee

Specific jurisdiction is proper where the claims in the case arise from or are related to the defendant's contacts with the forum state. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 149 (6th Cir. 1997). The three-pronged test for specific jurisdiction is:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968).

Again, because the Amended Complaint does not allege that Defendants created any defamatory statements, and because Defendants' declarations establish that they did not create any defamatory statements, the CDA expressly prohibits any claim which treats Defendants as the speakers of the statements at issue here. Thus, since Defendants cannot be treated as the publisher/speaker of these statements, Plaintiff cannot establish that Defendants "purposefully directed" tortious conduct at it in Tennessee. The failure of proof on this issue precludes a finding that specific jurisdiction exists; "the purposeful availment prong of the *Southern Machine* test [is] "essential" to a finding of personal jurisdiction." *Intera Corp. v. Henderson*, 428 F.3d 605, 616 (6th Cir. 2005) (emphasis added) (citing *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 722 (6th Cir. 2000); *LAK, Inc. v. Deer Creek Enters.*, 885 F.2d 1293, 1300 (6th Cir. 1989)).

Indeed, because the CDA provides a "complete shield" against liability, Defendants have simply not committed any tort whether directed at Tennessee or not. There is simply no basis to find specific jurisdiction here.

c. It Would Be Unreasonable To Exercise Jurisdiction Over Defendant

The third prong of the *Southern Machine* test mandates that "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *See Youn v. Track, Inc.*, 324 F.3d 409, 419 (6th Cir. 2003) (citation omitted). Generally, when considering whether it is reasonable to exercise personal jurisdiction over a non-resident defendant, a court must consider several factors including the following: (1) the burden on the defendant; (2) the interest of the forum state; (3) the plaintiff's interest in obtaining relief; and (4) other states' interest in securing the most efficient resolution of the controversy. *See CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1268 (6th Cir. 1996).

Here, these factors establish that all other arguments aside, it would be unreasonable for this Court to exercise jurisdiction over the Arizona-based Defendant. First, since Defendant Xcentric and all of its employees, records, etc., are located in Arizona, it would be a significant burden to litigate this matter in Tennessee. Second, it is most important to consider this—as explained in Mr. Magedson's declaration, the Rip-Off Report website is a free service to consumers that includes more than 230,000 original reports, over 1,000,000 unique entries, including rebuttals to reports, with an average of 800 new incoming submissions each day.

Unlike the New York Times, which has the resources and staff to fact-check each word it publishes, Defendant simply is not in a position to review the content of each new report before it appears on the website. This is precisely the reasoning behind the CDA's grant of immunity to website operators. Allowing websites to face liability for material authored by a third party would cause sites to prohibit users from posting any material at all, thus chilling both the content of speech and the forums for speech.

As such, the third factor—the Plaintiff's interest in obtaining relief—is exceptionally low here. This is not to say that Plaintiff is without any remedy; the CDA does not prohibit Plaintiff's claims against the original author, and as reflected in Mr. Merlo's email, Plaintiff is clearly aware of the author's identity.

V. CONCLUSION

Plaintiff's primary jurisdictional theory is that due to allegedly defamatory statements "published" on Rip-Off Report, Defendant Xcentric can be sued in Tennessee because it "intentionally targeted tortious conduct" at EASI in Tennessee. As explained above, this theory fails because the Communications Decency Act prohibits any claims which treat Defendant as the "publisher" of material created by a third party.

Plaintiff's Amended Complaint fails to allege that Defendants created any of the content at issue, and, in fact, the Complaint specifically concedes that Plaintiff's CEO is aware of the identify of the responsible author. There is no claim that this author is connected in any way with Defendant. Therefore, no basis exists for the exercise of personal jurisdiction in this forum.

For the reasons stated herein, Defendant Xcentric Ventures, LLC respectfully requests that the Court enter an order pursuant to Fed. R. Civ. P. 12(b)(2) dismissing the Amended Complaint of Plaintiff ENERGY AUTOMATION SYSTEMS, INC. Xcentric's claim for attorney fees will be included in its Rule 11 Motion to be filed subsequently.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that the foregoing has been served on the persons named below via the CMECF system employed by the District Court this 26th day of March, 2007.

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